FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

EDWARD J. LINNENBRINGER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 149.

BRIEF OF PETITIONER.

ROSCOE ANDERSON,
705 Olive Street,
St. Louis 1, Missouri,
Attorney for Petitioner.

Of Counsel:
WILLIAM WAYE, JR.,
First National Bank Building,
St. Charles, Missouri,
W. R. GILBERT,
705 Olive Street,
St. Louis 1, Missouri.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Caption	1
Opinions of the courts below	1
Jurisdiction	2
Constitution and statutes involved	2
Statement	3
Errors assigned, summary of argument and authorities	9
Argument	15
I. The Fifth Amendment to the Constitution requires the Government in a condemnation proceeding to compensate the landowner not only for the value of the land at the time of taking, but where the taking precedes payment, the Government must in addition to the value at the time of taking pay the landowner an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the additional amount which must be paid to the landowner	15
II. The Declaration of Taking Act requires the payment of interest where there is a delay in payment in accordance with the constitutional requirements of just compensation. Indeed, the purpose of the Act is to provide a means whereby the burden on the Government of paying interest can be reduced at the same time the landowners' constitutional rights are protected	24
III. The fact that the value of the property in a condemnation proceeding is fixed by a valid purchase contract between the Government and the landowner does not affect or diminish the right of the landowner to interest. Such rights of the landowner are determined by the condemnation statute invoked by the Government	31

IV. Where the purchase price or valuation of land is fixed by contract between the Government and the landowner, and the Government subsequently prosecutes an adversary condemnation proceeding under the Declaration of Taking Act but fails to deposit the full amount of the agreed price in the court, the landowner is entitled to interest on that portion of the value which was not deposited from the date of taking until the time it is finally paid 40

V. The payment of "interest" in condemnation proceedings, where the taking of the property precedes payment, is not the awarding of damages for delay in payment of an obligation of the United States. Instead, such "interest" is a portion of just compensation required by both the Declaration of Taking Act and the Fifth Amendment 46

Conclusion 59

Appendix A 61

Cases Cited.

Atlantic Coast Line R. Co. v. United States, 132 F. (2d) 959 ..... 10, 12, 19, 30

Brooks-Scanlon Corp. v. United States, 265 U. S. 106 ..... 9, 18

Brown v. United States, 263 U. S. 78 ..... 10, 19

Catlin v. United States, 324 U. S. 229 ..... 12, 25

Commercial Station Post Office v. United States (C. C. A. 8th, 1931), 48 F. (2d) 183 ..... 10, 19

Danforth v. United States, 308 U. S. 271 ..... 10, 12, 14, 19, 31, 32, 33, 39, 50, 51

Dominion Smelting & Refining Corp. of N. J. v. United States, 102 Ct. Cl. 281 ..... 12, 13, 30, 37

Hammond-Knowlton v. United States, 121 F. (2d) 192 (cert. denied, 314 U. S. 694) 13, 36

Holley v. United States (C. C. A. 6th, 1942), 124 F. (2d) 909 ..... 13, 14, 44, 56

Hopkins v. McClure, 148 F. (2d) 67 ..... 13, 37

Jacobs v. United States,
290 U. S. 13.....9, 13, 14, 16, 22, 50, 51, 56

Kielselbach v. Commissioner of Internal Revenue, 317
U. S. 399.....12, 30

Lee v. United States (Ct. App. D. C., 1932), 58 F.
(2d) 879.....12, 28

Miller v. St. Louis & K. C. R. Co., 162 Mo. 424, 63
S. W. 85.....11, 20
Muschany v. United States,
324 U. S. 49.....12, 14, 32, 39, 49, 52

Oliver v. United States (C. C. A. 8th), 155 F. (2d) 73.. 36

Parks v. Boston, 15 Pick. (32 Mass.) 198.....9, 15
Phelps v. United States, 274 U. S. 341....9, 12, 14, 18, 24, 56
Plum v. Kansas City, 101 Mo. 525.....11, 20
Prince Line v. United States (D. C. 1922), 283 F. 535
(writ of error dismissed, 263 U. S. 727).....10, 19

Reed v. Chicago, M. & St. P. R. Co. (C. C. 1885), 25
F. 886.....10, 19

Seaboard Air Line R. Co. v. United States, 216 U. S.
299.....10, 11, 14, 19, 20, 24, 51, 55
Seaside Improvement Co. v. Commissioner of Internal
Revenue (C. C. A. 2d, 1939), 105 F. (2d) 990 (cert.
denied, 308 U. S. 618).....10, 19
Shoshone Tribe v. United States,
299 U. S. 476.....9, 14, 18, 21, 55
Smyth v. United States, 302 U. S. 329.....14, 53

Theyer-West Point Hotel Co. v. United States, 64
F. Supp. 565.....14, 57, 58

United States v. Baugh (C. C. A. 5th, 1945), 149 F.
(2d) 190.....10, 13, 14, 19, 40, 41, 44, 52
United States v. Benedict, 261 U. S. 294.....10, 19
United States v. Bothwell (D. C. 1925), 7 F. (2d)
624.....10, 19
United States v. Certain Land in City of St. Louis, Mo.
(D. C. Mo. 1944), 58 F. Supp. 305.....10, 20
United States v. Certain Land in City of St. Louis, Mo.
(D. C. Mo., 1941), 41 F. Supp. 809, aff'd, O'Donnell
v. United States, 131 F. (2d) 882.....11, 23

United States v. First National Bank (D. C. 1918), 250 F. 299 ..... 10, 19
United States v. 412.715 Acres of Land in Contra Costa County (D. C. Cal., 1945), 60 F. Supp. 576 ..... 10, 19, 23
United States v. 0.45 Acres of Land (C. C. A. 2d, 1945), 151 F. (2d) 114 ..... 12, 25
United States v. 40,379 Square Feet of Land, More or Less, in City of Newton (D. C. Mass., 1944), 58 F. Supp. 246 ..... 10, 20, 23
United States v. Highsmith, 257 F. 401, aff'd 255 U. S. 170 ..... 10, 19
United States ex rel. T. V. A. v. Indian Creek Marble Co. (D. C. Tenn.), 40 F. Supp. 811 ..... 11, 20
United States v. Klamath Indians, 204 U. S. 119 .. 10, 19, 21
United States v. Lynah, 188 U. S. 445 ..... 14, 56
United States v. McIntosh, 2 F. Supp. 244 ..... 14, 57
United States v. Miller, 317 U. S. 369 ..... 12, 25
United States v. North American Transp. & Trading Co., 253 U. S. 330 ..... 13, 14, 36, 53, 54
United States v. Northern Pac. Ry. Co. (D. C. Wash., 1943), 51 F. Supp. 749 ..... 11, 20, 22
United States v. Oliver (D. C. Mo.), 60 F. Supp. 741 .. 36
United States v. 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa. (D. C. Pa., 1944), 54 F. Supp. 193 ..... 11, 20
United States v. 1997.66 Acres of Land (C. C. A. 8th, 1943), 137 F. (2d) 8 ..... 12, 25
United States v. Rogers, 255 U. S. 163 .. 9, 14, 17, 18, 20, 54
United States v. Sargent (C. C. A. 8th, 1908), 162 F. 81 (writ of error dismissed in 215 U. S. 618) 10, 19
United States v. 17,280 Acres of Land, More or Less, Situate in Saunders County, Neb. (D. C. Neb., 1944), 57 F. Supp. 745 ..... 11, 20
United States v. 6.87 Acres of Land in Village of Garden City, Nassau County, N. Y. (C. C. A. 2d, 1945), 147 F. (2d) 351 ..... 10, 19, 22
United States v. Sixty-Two Parcels of Land in New Castle County (D. C. Del., 1938), 22 F. Supp. 540 ..... 10, 19, 22
United States v. Sunset Cemetery Co. (C. C. A. 7th, 1943), 132 F. (2d) 163 ..... 12, 30, 35, 39

United States v. 2008 Acres of Land in Harmar Tp., Allegheny County, Pa. (D. C. Pa., 1940), 35 F. Supp. 265 ..... 11, 20
United States v. 26.3765 Acres of Land, More or Less, Situate in Town of Hempstead, Nassau County, N. Y. (D. C. N. Y.), 62 F. Supp. 910 ..... 11, 12, 20
Webster v. Kansas City & S. Ry. Co., 116 Mo. 114, 22 S. W. 474 ..... 11, 20
Weiser Valley Land & Water Co. v. Ryan (C. C. A. 9th, 1911), 190 F. 417 ..... 10, 19

Constitution Cited.

Constitution of the United States, Fifth Amendment 2, 9, 11, 12, 14, 61

Statutes Cited.

Act of May 25, 1926, as amended by Acts of January 13, 1928, and March 31, 1930, 44 Stat. 630, 45 Stat. 51, 46 Stat. 136, 40 U. S. C. A., Sec. 341 et seq. 28
Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a 2, 11, 12, 13, 14, 23, 27, 34, 44, 61
Mississippi River Flood Control Act, May 15, 1928, 45 Stat. 534, Ch. 569, 33 U. S. C. A., Sec. 702a et seq. 33, 34
Revenue Acts 1934, 1936, Sec. 22 (b), 26 U. S. C. A., Internal Revenue Code, Sec. 22 (b) 45
Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20) 2, 12, 14, 16, 33, 61

Texts and Articles Cited.

"American Economic Mobilization," 55 Harvard L. R. 427 14
Attorney General of the United States, Annual Reports for the fiscal years ending June 30, 1939, 1940, 1941, 1942, 1943 ..... 14, 46
Just, Carolyn, "Condemnation Procedure During World War II," 12 George Washington L. R. 286 ..... 14, 46
Lands Division, Department of Justice, "Federal Eminent Domain" (1940) 12, 14, 47, 48
Marcus, Philip, "The Taking and Destruction of Property Under a Defense and War Program," 27 Cornell L. Q. 317 ..... 14, 46, 47, 56

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

EDWARD J. LINNENBRINGER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 149.

BRIEF OF PETITIONER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Edward J. Linnenbringer, petitioner herein, and respectfully files his brief herein.

OPINIONS OF THE COURTS BELOW.

The opinion (R. 162) of the District Court of the United States for the Eastern District of Missouri is reported at 61 F. Supp. 199. The memorandum opinion of the Circuit

Court of Appeals for the Eighth Circuit is reported at 155 F. (2d) 77, where it is stated that the decision of the instant case was ruled by the companion case of Oliver et al. v. United States, which is reported at 155 F. (2d) 73. (The opinion of the District Court in the Oliver case is reported at 69 F. Supp. 741.)

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered April 9, 1946 (R. 305), 155 F. (2d) 77. The Petition for Rehearing was denied April 30, 1946 (R. 341). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, Ch. 229 (28 U. S. C. A., Sec. 347, 8 F. C. A., Title 28, Sec. 347). This Court granted the Petition for Writ of Certiorari on October 14, 1946.

CONSTITUTION AND STATUTES INVOLVED.

The constitutional amendment involved is the Fifth Amendment to the Constitution of the United States. The statutes involved are the Declaration of Taking Act, Feb. 26, 1931, c. 307, Sec. 1, 46 Stat. 1421, 40 U. S. C. A., Sec. 258a, and the Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20). The pertinent portions of the Fifth Amendment and these statutes are set forth in Appendix A.

STATEMENT.

The United States of America, the Respondent herein, instituted proceedings by filing in the District Court of the United States for the Eastern District of Missouri a Declaration of Taking (R. 137) and a Petition in Condemnation (R. 129) pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258 (a), to condemn certain land owned by petitioner.

Prior to the filing of the petition in condemnation certain transactions had transpired between the parties. On or about November 30, 1940, the petitioner and his wife granted the United States of America an option (R. 149) to purchase for the sum of $34,000.00 the real estate (including improvements) described in the petition in condemnation filed by the United States. On December 6, 1940, the United States, by its duly authorized official, Col. R. D. Valliant, accepted said option (R. 151). This contract provided that the Government should have the right of immediate occupancy and use of the land for any purpose from and after the acceptance by the Government of the option (R. 150-1).

The contract also provided that the landowners would deliver a general warranty deed conveying the fee simple title to the United States and that upon the furnishing of final certificate of title showing title to be vested in the United States, the Government would then pay the "agreed purchase price" to the landowners. It was further provided that (R. 151):

> "If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation

Phelps v. United States, 274 U. S. 341;
United States v. Miller, 317 U. S. 369;
United States v. 1997.66 Acres of Land, (C. C. A. 8th, 1943) 137, F. (2d) 8;
United States v. 0.45 Acres of Land, (C. C. A. 2d, 1945), 151 F. (2d) 114;
Catlin v. United States, 324 U. S. 229;
United States v. 26.3765 Acres of Land, (D. C. N. Y. 1945), 62 F. Supp. 910;
Lee v. United States (Ct. App. D. C., 1932), 58 F. (2d) 879;
Kieselbach v. Commissioner of Internal Revenue, 317 U. S. 399;
Atlantic Coast Line R. Co., v. United States, 132 F. (2d) 959;
United States v. Sunset Cemetery Co., (C. C. A. 7th. 1943), 132 F. (2d), 163;
Dominion Smelting & Refining Corp., of N. J., v. United States, 102 Ct. Cl. 281;
Danforth v. United States, 308 U. S. 271.

C. The fact that the value of the property in a condemnation proceeding is fixed by a valid purchase contract between the Government and the landowner does not affect or diminish the right of the landowner to interest. Such rights of the landowner are determined by the condemnation statute invoked by the Government.

Constitution of the United States, Fifth Amendment;
Lands Division, Department of Justice, 1 Federal Eminent Domain, Sec. 42;
Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A. Sec. 258a;
Muschany v. United States, 324 U. S. 49;
Danforth v. United States, 308 U. S. 271;
Tucker Act, Section 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20);
United States v. Sunset Cemetery Co., 132 F. (2d) 163;

Hammond-Knowlton v. United States, 121 F. (2d) 192, Cert. denied 314 U. S. 694;
United States v. North American Transp. & Trading Co., 253 U. S. 330;
Hopkins v. McClure, 148 F. (2d) 67;
Dominion Smelting & Refining Corp. of N. J., v. United States, 102 Ct. Cl. 281.

II.

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the landowner converted the adversary condemnation proceeding into a suit on contract and that therefore interest was not allowable as it would be tantamount to awarding interest against the United States by way of damages for delay in payment of an obligation, because:

A. Even where the purchase price or valuation of land is fixed by contract between the Government and the landowner, and the Government subsequently prosecutes an adversary condemnation proceeding under the Declaration of Taking Act but fails to deposit the full amount of the agreed price in the court, the landowner is entitled to interest on that portion of the value which was not deposited from the date of taking until the time it is finally paid:

Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A. 258 (a);
United States v. Baugh, 149 F. (2d) 190;
Holley v. United States (CCA 6th, 1942), 124 F. (2d) 909;
Jacobs v. United States, 290 U. S. 13.

B. The payment of "interest" in condemnation proceedings, where the taking of the property precedes payment, is not the awarding of damages for delay in payment of an

obligation of the United States. Instead, such "interest" is a portion of just compensation required by both the Declaration of Taking Act and the Fifth Amendment.

Marcus, Philip, "The Taking and Destruction of Property Under a Defense and War Program," 27 Cornell L. Q. 317;

Just, Carolyn, "Condemnation Procedure During World War II," 12 George Washington L. R. 286;

Attorney General of the United States, Annual Reports for the fiscal years ending June 30, 1939, 1940, 1941, 1942 and 1943;

"American Economic Mobilization," 55 Harv. L. R. 427;

Lands Division, Department of Justice, "Federal Eminent Domain," Sections 34-39, 42;

Muschany v. United States, 324 U. S. 49;

Danforth v. United States, 308 U. S. 271;

Constitution of the United States, Fifth Amendment;

Declaration of Taking Act, 46 Stat. 1421, ch. 307, 40 U. S. C. A., Sec. 258a;

Jacobs v. United States, 290 U. S. 13;

United States v. North American Transp. & Trading Co., 253 U. S. 330;

Seaboard Air Line R. Co. v. United States, 261 U. S. 299;

United States v. Baugh, 149 F. (2d) 190;

Smyth v. United States, 302 U. S. 329;

United States v. Rogers, 255 U. S. 163;

Shoshone Tribe v. United States, 299 U. S. 476;

Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20);

United States v. Lynah, 188 U. S. 445;

Phelps v. United States, 274 U. S. 341;

Holley v. United States, 124 F. (2d) 909;

United States v. McIntosh, 2 F. Supp. 244;

Thayer-West Point Hotel Co. v. United States, 64 F. Supp. 565.

ARGUMENT.

I.

The Fifth Amendment to the Constitution Requires the Government in a Condemnation Proceeding to Compensate the Landowner Not Only for the Value of the Land at the Time of Taking, But Where the Taking Precedes Payment the Government Must, in Addition to the Value at the Time of Taking, Pay the Landowner an Amount Sufficient to Produce the Full Equivalent of That Value Paid Contemporaneously With the Taking. Interest at a Proper Rate Is a Good Measure by Which to Ascertain the Additional Amount Which Must Be Paid to the Landowner.

It has long been the rule in this country that when the landowner is not paid the value of the land taken under the power of eminent domain at the time of the taking he must be compensated with an additional amount in order that he will receive just compensation. Thus, it was graphically said in the early case of Parks v. Boston, 15 Pick. (32 Mass.) 198, 208 (1834):

> "The rule would be, as in the case of other purchases, that the price is due and ought to be paid at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder court would be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary, by the terms of law, to conduct the inquiry, and this delay must be compensated by interest."

This Court has consistently recognized that the payment of interest constitutes a part of just compensation re-

quired by the Fifth Amendment whenever the taking preceded the payment of the fair value of the land determined as of the time of the taking.

In Jacobs v. United States, 290 U. S. 13, the United States constructed a dam which caused an increase in the occasional overflows of certain lands. The landowners and the Government were not able to reach a settlement, so the landowners brought separate suits under the Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20), to recover compensation for the property taken. The District Court found that the landowners were entitled to the amount of damage caused by the construction of the dam as of the date of its completion, together with interest from the date of taking to the date of the entry of the judgment. The Circuit Court of Appeals reversed the District Court on the ground that since the suits were not condemnation proceedings instituted by the Government, but were suits founded upon an implied contract, interest could not be allowed. This Court, in reversing the Circuit Court of Appeals, pointed out that the "remedy did not qualify the right," because the suits were founded upon the Constitution of the United States and summarized the applicable law as follows:

> "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and **no specific command to include interest is necessary** when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 306, 67 L. ed. 664, 669, 43 S. Ct. 354. That suit was brought by

the owner under Sec. 10 of the Lever Act, which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that **the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate.** See also United States v. Rogers, 255 U. S. 163, 169, 65 L. ed. 556, 568, 41 S. Ct. 281.

"The principle was restated in Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083, 47 S. Ct. 611. There the suit was brought in the Court of Claims, and that court gave judgment for the value of the property as it was found to be at the time of the requisition. Plaintiffs insisted that they were entitled to an additional amount to produce the equivalent of the value of the property 'paid contemporaneously' and that, for this purpose, interest as a reasonable measure should be allowed. This Court sustained the claim. **The Court held that judgment in 1926 for the value of the use of the property in 1918 or 1919, without more, was not sufficient to constitute just compensation that the claim was not for 'interest' within the meaning of Sec. 177 of the Judicial Code** (U. S. C., Title 28, Sec. 284), **and that that provision did not preclude the recovery of the additional amount asked.** To the same effect are Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 123, 68 L. ed. 934, 941, 44 S. Ct. 471; Liggett & M. Tobacco Co. v. United States, 274 U. S. 215, 71 L. ed. 1006, 47 S. Ct. 581." (Emphasis supplied here, and throughout this brief, unless otherwise specified.)

In United States v. Rogers, 255 U. S. 163, the United States brought action on January 18, 1915, to condemn certain lands for reclamation purposes. The award of the Commission was filed February 3, 1915, and an order was entered July 27, 1915, by the District Court directing that the sums awarded be deposited and distributed for the benefit of the landowners. Subsequently, the owners made

and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

Pursuant to the terms of this agreement, Edward J. and Emma Linnenbringer executed and delivered to the United States a warranty deed dated January 9, 1941, acknowledged by the grantors on January 13, 1941, whereby the real estate described in the petition in condemnation was conveyed to the United States (R. 151). The said deed was accepted by the United States and on the 7th day of February, 1941, it was filed for record in the Recorder's office of St. Charles County, Missouri, and was recorded in said office in book 197, page 177 (R. 151).

The Government took possession of the said real estate described in the petition in condemnation on or about January 13, 1941 (R. 151), and has since that time been continuously in possession of said real estate.

The United States thereafter repudiated said contract and commenced this adversary condemnation proceeding. On June 16, 1941, a "Declaration of Taking" (R. 137) was filed, signed by Henry L. Stimson, Secretary of War of the United States, in the District Court under the authority of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, Sec. 307, 40 U. S. C., Sec. 258a, and other condemnation statutes. The "Declaration of Taking" (R. 137) stated that the said lands (being the same land which the Government had taken possession of on or about January 13, 1941, pursuant to the purchase contract) were required for immediate use to provide a site of the Weldon Spring Ordnance Plant, that the estimated "just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto"

was $16,000, which sum was deposited in the Registry of the District Court (R. 143). Then on June 18, 1941, the United States of America filed a "Petition in Condemnation" (R. 129) in the District Court in which it prayed, inter alia, that "The court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sustained by the respective owners," that the "court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable," that "the court, upon the filing of this petition, will make an order pursuant to the Act of Congress approved February 23, 1931 (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of the lands."

Also on June 18, 1941, the District Court entered an "Order and Judgment on Declaration of Taking" (R. 140), wherein it was ordered that title to said lands in fee simple absolute vest in the United States of America. The Order also provided that "the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law."

On July 23, 1941, Edward J. Linnenbringer and his wife Emma Linnenbringer, filed an answer (R. 143) to the petition in condemnation in which they alleged, inter alia, that the Government had accepted the option to purchase said land for the price and sum of $34,000.00; that pursuant to such contract they executed and delivered a warranty deed which was accepted by the Government and filed for record in the Recorder's Office of St. Charles County, Missouri, book 197, page 177, and that pursuant

to said contract the Government took possession of said land on or about January 13, 1941. It was also alleged that the United States of America was estopped by reason of the facts alleged to claim it was entitled to the appointment of commissioners and that it was estopped to proceed in the condemnation proceedings except in accordance with the contract. They also prayed that judgment be entered for $34,000.00, with interest from January 13, 1941, the date of possession, at the rate of 6 per cent per annum. Pending the litigation, Emma Linnenbringer died (R. 157), and petitioner became the sole owner.

Then almost four years after the filing of the petition in condemnation, and after the decision in Muschany v. United States, 324 U. S. 49, on April 6, 1945, the Government filed a motion entitled "Motion for Judgment for Plaintiff in Condemnation and for Defendants Fixing Compensation by Option," (R. 155) in which it moved "the court to enter judgment in this cause for condemnation of said real estate, fixing the compensation to be paid by the plaintiff to defendants in the sum of $34,000.00." In the motion the Government stated that the sum of $34,000.00 was "The amount of compensation fixed in said option contract" and that "the United States Supreme Court in the case of Muschany v. United States, 89 L. Ed. Adv. Op. 492 (1945), had held an option contract to be valid and binding, which option contract is identical with the provisions of the option contract in this case with the exception of the names of the owners, the description of the property and the amount of compensation."

Petitioner, Edward J. Linnenbringer, answered (R. 156) said motion and alleged, inter alia, that he (Emma Linnenbringer, his wife, having died) was "entitled to judgment in the said cause for the sum of $34,000.00 with interest on said sum at 6% per annum from the 13th day of January, 1941, to June 18, 1941, and interest on the

sum of $34,000.00 less the sum of $16,000.00 deposited in the registry of this court on June 18, 1941, to-wit, the sum of $18,000.00 at 6% per annum from June 18, 1941, to date said entire sum is paid to this defendant."

On May 17, 1945, before the court ruled on its motion, the United States deposited in the registry of the court the $18,000.00 (R. 160).

The District Court entered its opinion (R. 162) on June 8, 1945, and entered its findings and judgment (R. 180) on July 2, 1945, awarding the petitioner the sum of $34,000.00 as the price of the land along with $4,230.00, being the amount of interest at the rate of 6% per annum, which the Court held due the petitioner under the Declaration of Taking Act on $18,000.00 from June 18, 1941, the date of the deposit of $16,000.00, to May 17, 1945, the date when the $18,000.00 was deposited in the Registry of the Court. The $18,000.00 was the difference between $34,000.00, the price of the land fixed in the contract, and the $16,000.00 which was deposited in the Registry of the District Court as the estimated just compensation. Petitioner had sought interest from the date of actual taking of possession on January 13, 1941, but the District Court ruled against that contention and held that interest should run from the filing of the Declaration of Taking and since the petitioner did not appeal from that holding he is bound by that portion of the findings and judgment.

On April 9, 1946, the Circuit Court of Appeals for the Eighth Circuit entered its judgment, 155 F. (2d) 77 (R. 305), reversing the judgment of the District Court. In the opinion in this cause the Circuit Court of Appeals referred to and adopted an opinion filed by it the same day in the case of Oliver v. United States, 155 F. (2d) 73 (No. 13154 in the Circuit Court of Appeals).

In that opinion (R. 296) the Circuit Court of Appeals held that the contract did not provide for the payment of

interest, that the purchase price provided was "not merely the agreed fair value of the land," but "may be fairly regarded, at the very least, as the agreed equivalent of just compensation for the taking of land by condemnation or by purchase" (R. 302). It was held that: "By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract" (R. 302). The Court further held that "in the absence of a statute or an express contract providing for it, interest cannot be added to an obligation of the United States," and that the allowance of interest upon the price "would be tantamount to awarding interest against the United States by way of damages for delay in the payment of an obligation, '* * * interest does not run upon claims against the government even though there has been a default in the payment of the principal.' Smyth v. United States, 302 U. S. 329, 353" (R. 303).

The Circuit Court of Appeals further stated (R. 303) that it thought United States v. Baugh (C. C. A. 5th), 149 F. 2d 190, "may be distinguished * * * on the ground that the contract there involved was interpreted by the Court as fixing only the fair value of the land for the purpose of a condemnation then proceeding, but that: If, however, this distinction is not warranted, we are unable to follow the decision of the Baugh case."

ERRORS ASSIGNED, SUMMARY OF ARGUMENT AND AUTHORITIES.

I.

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the petitioner was not entitled to interest from June 18, 1941 to May 17, 1945 on $18,000, which was the difference between $16,000 deposited in the Court as the estimated just compensation on June 18, 1941 and $34,000 awarded by the Court as the value of the land pursuant to a motion by the Government based upon a valid and binding purchase contract where the said $18,000 was not deposited in the court until May 17, 1945, because:

A. The Fifth Amendment to the Constitution requires the Government in a condemnation proceeding to compensate the landowner not only for the value of the land at the time of taking, but where the taking precedes payment, the Government must in addition to the value at the time of taking pay the landowner an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the additional amount which must be paid to the landowner.

Constitution of the United States, Fifth Amendment;
Parks v. Boston, 15 Pick. (32 Mass.) 198;
Jacobs v. United States, 290 U. S. 13;
United States v. Rogers, 255 U. S. 163;
Phelps v. United States, 274 U. S. 341;
Brooks-Scanlon Corp. v. United States, 265 U. S. 106;
Shoshone Tribe v. United States, 299 U. S. 476;

Seaboard Air Line R. Co. v. United States, 261 U. S. 299;
United States v. Klamath Indians, 204 U. S. 119;
United States v. Benedict, 261 U. S. 294;
Brown v. United States, 263 U. S. 78;
Danforth v. United States, 308 U. S. 271;
Reed v. Chicago, M. & St. P. R. Co. (C. C. 1885), 25 F. 886;
United States v. Sargent (C. C. A. 8th, 1908), 162 F. 81 (writ of error dismissed in 215 U. S. 618);
Weiser Valley Land & Water Co. v. Ryan (C. C. A. 9th, 1911), 190 F. 417;
United States v. First National Bank (D. C. 1918), 250 F. 299;
Prince Line v. United States (D. C. 1922), 283 F. 535 (writ of error dismissed in 263 U. S. 727);
United States v. Bothwell Co. (D. C. 1925), 7 F. (2d) 624;
Commercial Station Post Office v. United States (C. C. A. 8th, 1931), 48 F. (2d) 183;
Seaside Improvement Co. v. Commissioner of Internal Revenue (C. C. A. 2d, 1939), 105 F. (2d) 990 (cert. denied 308 U. S. 618);
Atlantic Coast Line R. Co. v. United States (C. C. A. 1943), 132 F. (2d) 959;
United States v. Highsmith, 257 F. 401, affirmed 255 U. S. 170;
United States v. Sixty-Two Parcels of Land in New Castle County (D. C. Del., 1938),22 F. Supp. 540;
United States v. 6.87 Acres of Land in Village of Garden City, Nassau County, N. Y. (C. C. A. 2d 1945), 147 F. (2d) 351;
United States v. Baugh (C. C. A. 5th), 149 F. (2d) 190;
United States v. 412.715 Acres of Land in Contra Costa County (D. C. Cal.), 60 F. Supp. 576;
United States v. 40.379 Square Feet of Land, More or Less, in City of Newton, Middlesex County, Mass. (D. C. Mass. 1944), 58 F. Supp. 246;
United States v. Certain Land in City of St. Louis, Missouri (D. C. Mo. 1944), 58 F. Supp. 305;

United States v. 17,280 Acres of Land, More or Less, Situate in Saunders County, Neb. (D. C. Neb. 1944), 57 F. Supp. 745;
United States v. 26.3765 Acres of Land, More or Less, Situate in Town of Hempstead, Nassau County, N. Y. (D. C. N. Y.), 62 F. Supp. 910;
United States v. 20.08 Acres of Land in Harmar Tp., Allegheny County, Pa. (D. C. Pa.), 35 F. Supp. 265;
United States v. 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa. (D. C. Pa. 1944), 54 F. Supp. 193;
United States ex rel. T. V. A. v. Indian Creek Marble C. (D. C. Tenn.), 40 F. Supp. 811;
United States v. Northern Pac. Ry. Co. (D. C. Wash. 1943), 51 F. Supp. 749;
Plum v. Kansas City, 101 Mo. 525;
Webster v. The Kansas City & S. Ry. Co., 116 Mo. 114, 22 S. W. 474;
Miller v. St. Louis & K. C. R. Co., 162 Mo. 424, 63 S. W. 85;
United States v. Certain Land in the City of St. Louis, Mo. (D. C. Mo. 1941), 41 F. Supp. 809, affirmed O'Donnell v. United States, 131 F. (2d) 882.

B. The Declaration of Taking Act requires the payment of interest where there is a delay in payment in accordance with the constitutional requirements of just compensation. Indeed, the purpose of the Act is to provide a means whereby the burden on the Government of paying interest can be reduced at the same time the landowners' constitutional rights are protected:

Constitution of the United States, Fifth Amendment;
Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a;
Seaboard Air Line R. Co. v. United States, 216 U. S. 299;

a motion for a supplemental order requiring the United States to deposit sums equal to 6% interest on the awards calculated from April 19, 1912, the time when the lands were taken by flooding and such an order was entered. This Court, in upholding the requirement of the payment of interest, said at l. c. 168-169:

> "* * * Was there error in awarding the owners interest on the value of their lands appropriated from the time of actual taking of the same until compensation was made?
>
> "It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. United States ex rel. Angarica v. Bayard, 127 U. S. 251, 260, 32 L. Ed. 159, 163, 8 Sup. Ct. Rep. 1156; United States v. North Carolina, 136 U. S. 211, 216, 34 L. Ed. 336, 338, 10 Sup. Ct. Rep. 90, cited and approved in National Home v. Parrish, 229 U. S. 494, 496, 57 L. Ed. 1296, 1298, 33 Sup. Ct. Rep. 944. **In the present case the landowners did not sue upon a claim against the government,** as was the fact in United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. Ed. 935, 40 Sup. Ct. Rep. 518. **The government was seeking, for purposes authorized by statute, to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.**
>
> "**Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property.** Monongahela Nav. Co. v. United States, 148 U. S. 312, 314, 37 L. Ed. 463, 473, 13 Sup. Ct. Rep. 622."

Application of the same principle is to be found in a number of other decisions by this Court. See: Phelps v. United States, 274 U. S. 341; Brooks-Scanlon Corp. v. United States, 265 U. S. 106; Shoshone Tribe v. United

States, 299 U. S. 476; Seaboard Air Line R. Co. v. United States, 261 U. S. 299; United States v. Klamath Indians, 304 U. S. 119; United States v. Benedict, 261 U. S. 294; Brown v. United States, 263 U. S. 78; Danforth v. United States, 308 U. S. 271.

Lower Federal Courts have likewise applied the same rule:

Reed v. Chicago, M. & St. P. R. Co. (C. C. 1885), 25 F. 886;

United States v. Sargent (C. C. A. 8th, 1908), 162 F. 81 (writ of error dismissed in 215 U. S. 618);

Weiser Valley Land & Water Co. v. Ryan (C. C. A. 9th, 1911), 190 F. 417;

United States v. First National Bank (D. C. 1918), 250 F. 299;

Prince Line v. United States (D. C. 1922), 283 F. 535 (writ of error dismissed in 263 U. S. 727);

United States v. Bothwell Co. (D. C. 1925), 7 F. (2d) 624;

Commercial Station Post Office v. United States (C. C. A. 8th, 1931), 48 F. (2d) 183;

Seaside Improvement Co. v. Commissioner of Internal Revenue (C. C. A. 2d, 1939), 105 F. (2d) 990 (cert. denied 308 U. S. 618);

Atlantic Coast Line R. Co. v. United States (C. C. A. 1943), 132 F. (2d) 959;

United States v. Highsmith, 257 F. 401, affirmed 255 U. S. 170;

United States v. Sixty-Two Parcels of Land in New Castle County (D. C. Del. 1938), 22 F. Supp. 540;

United States v. 6.87 Acres of Land in Village of Garden City, Nassau County, N. Y. (C. C. A. 2d, 1945), 147 F. (2d) 351;

United States v. Baugh (C. C. A. 1945), 149 F. (2d) 190;

United States v. 412.715 Acres of Land in Contra Costa County (D. C. Cal. 1945), 60 F. Supp. 576;

United States v. 40,379 Square Feet of Land, More or Less, in City of Newton, Middlesex County, Mass. (D. C. Mass. 1944), 58 F. Supp. 246;
United States v. Certain Land in City of St. Louis, Missouri (D. C. Mo. 1944), 58 F. Supp. 305;
United States v. 17,280 Acres of Land, More or Less, Situate in Saunders County, Neb. (D. C. Neb. 1944), 57 F. Supp. 745;
United States v. 26.3765 Acres of Land, More or Less, Situate in Town of Hempstead, Nassau County, N. Y. (D. C. N. Y.), 62 F. Supp. 910;
United States v. 20.08 Acres of Land in Harmar Tp., Allegheny County, Pa. (D. C. Pa. 1940), 35 F. Supp. 265;
United States v. 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa. (D. C. Pa. 1944), 54 F. Supp. 193;
United States ex rel. T. V. A. v. Indian Creek Marble Co. (D. C. Tenn.), 40 F. Supp. 811;
United States v. Northern Pac. Ry. Co. (D. C. Wash. 1943), 51 F. Supp. 749.

The same rule is applied in Missouri, the state in which the land here involved is located. Plum v. Kansas City, 101 Mo. 525; Webster v. The Kansas City & S. Ry. Co., 116 Mo. 114, 22 S. W. 474; Miller v. St. Louis & K. C. R. Co., 162 Mo. 424, 63 S. W. 85.

While the Circuit Court of Appeals for the Eighth Circuit in the instant case recognized the principle that a landowner is entitled to interest upon the fair value of the land from the date of taking until payment, citing (R. 300) United States v. Rogers, supra, and Seaboard Air Line R. Co. v. United States, supra, it totally failed to apply that principle to the facts of the instant case. This failure undoubtedly resulted in part from a misconception of the nature of this required additional compensation which is measured by "interest." The "interest" is not recoverable qua interest but as a pragmatic method of

arriving at the just compensation required by the Fifth Amendment. It is a formula for calculating or measuring the additional amount which must be paid the landowner in order that he will receive just compensation where the taking precedes payment. As said by this Court in Jacobs v. United States, 290 U. S. 13, 16-17:

> "* * * The concept of just compensation is comprehensive and includes all elements. 'And no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a **good measure** by which to ascertain the amount so to be added.'"

This additional amount is added to the value determined as of the time of the taking. Thus this Court said in United States v. Klamath and Moadoc Tribes, 304 U. S. 119, 123:

> "Nor is it quite accurate to say that interest as such is added to value at the time of the taking in order to arrive at just compensation subsequently ascertained and paid. The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

And given the taking, the right to an additional amount, where payment is made subsequently, in the form of "interest" or a fair equivalent thereof, "attaches itself automatically to the right to an award of damages." Shoshone Tribe v. United States, 299 U. S. 476, 497.

It is sometimes said that this measure of "interest" is to compensate for the delay in payment of the value of the land taken. United States v. 6.87 Acres of Land in Village of Garden City (C. C. A. 2d), 147 F. (2d) 351.

> "The jury erred in calling the damages for delay 'interest.' It was the duty of the jury to determine the damages for delay by an interest rate. • • • The error in form of the verdict does not affect the substantial rights of the parties." United States v. 20.08 Acres of Land in Harmar Tp. (D. C. Pa. 1940), 35 F. Supp. 265.

The more generally accepted and sounder rationale is that the additional amount is to compensate the owner for the use of the property after the taking and prior to payment therefor. Regardless of which rationale is adopted, the result is the same: the additional amount, measured by "interest," is not interest per se, but is a necessary part of just compensation.

> "Such additional allowance may be measured by a reasonable rate of interest but it is not properly interest. Phelps v. United States, 274 U. S. 341, 344, 47 S. Ct. 611, 71 L. Ed. 1083. Interest is allowed, not as interest, but as the equivalent of the value of the use of the property or its money equivalent."
>
> United States v. Northern Pac. Ry. Co. (D. C. Wash. 1943), 51 F. Supp. 749, 750.

> "The United States had possession of the land from the date of taking until the day of the verdict of the jury and thereafter. For the damages suffered by the owner during that period the owner is entitled to just compensation. The 6 per cent interest contained in the instruction of the court was not to be awarded qua interest for default or delay in paying the value of the land at the time of the taking, but qua damages for dispossessing the owner during that period of time."
>
> United States v. Sixty-two Parcels of Land (D. C. Del. 1938), 22 F. Supp. 540.

"The Fifth Amendment to the Federal Constitution guarantees to property owners full compensation for property taken for public use. That the full compensation guaranteed by the Constitution includes interest on just compensation finally awarded when all or a portion thereof is withheld after the taking is no longer an open question. The full compensation includes the value of the use of the property after the taking and prior to payment therefor (cases cited). But interest as such is not **added** to value at the time of taking in order to arrive at just compensation subsequently ascertained and paid. Interest is merely the equivalent of the value of a portion of the property taken, in this instance the value of the use of the property at the time it was taken."

United States v. Certain Land in City of St. Louis, Mo. (D. C. Mo. 1941), 41 F. Supp. 809, 812, affirmed O'Donnell v. United States, 131 F. (2d) 882.

In United States v. 40,379 Square Feet of Land (D. C. Mass. 1944), 58 F. Supp. 246, the Government instituted proceedings pursuant to the 1888 Act, 40 U. S. C. A., Secs. 257, 258, and took possession under a court order on May 26, 1943. Subsequently, on August 2, 1943, it filed a declaration of taking pursuant to 40 U. S. C. A., Sec. 258 (a). It was there held that the landowner was entitled to $45,180, the value of the land at the time of the taking, along with $1,500 as the fair market value of the use of the land from May 26, 1943, to August 2, 1943. Also interest was allowed on the amount awarded for use and occupancy at the local rate from the date of taking to August 2, 1943, day of judgment. Interest on the value of the land less the amount deposited in court was allowed at 6 per cent from the date of making the deposit until date of payment.

In United States v. 412.715 Acres (D. C. Calif. 1945), 60 F. Supp. 576, the landowners were excluded from possession on June 25, 1942. The declaration of taking was not

filed until March 15, 1945, and during the interim the landowners became liable for taxes. In order to compensate the landowners for the payment of these taxes as well as for the loss of use and occupancy the court awarded interest at 7 per cent per annum.

The foregoing body of law is clear and unequivocal. Where property is taken by the United States but the landowner is not paid the value at the time of the taking, he must be paid an additional amount, measured by interest, from the time of taking until the date of payment, if the just compensation requirement of the Fifth Amendment is to be satisfied.

II.

The Declaration of Taking Act Requires the Payment of Interest Where There Is a Delay in Payment in Accordance With the Constitutional Requirement of Just Compensation. Indeed, the Purpose of the Act Is to Provide a Means Whereby the Burden on the Government of Paying Interest Can Be Reduced at the Same Time the Landowner's Constitutional Rights Are Protected.

The landowner's right to just compensation, including an amount additional to the value of the land where payment is subsequent to the taking, "cannot be taken away by statute." Seaboard Air Line R. Co. v. United States, 216 U. S. 299. Moreover, "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." Phelps v. United States, 274 U. S. 341. The fact is that the very purpose of the Declaration of Taking Act was to protect the constitutional right of the landowner to just compensation, including that portion measured by interest, and at the same time to relieve the Government of the burden of

interest. This Court said in United States v. Miller, 317 U. S. 369, 381:

> "The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and **to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment** in the eminent domain proceeding. Second, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property. **The Act recognizes that there may be an error in the estimate** and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, **the owner shall recover the excess with interest.**"

See also:

United States v. 1,997.66 Acres of Land (CCA 8th, 1943), 137 F. (2d) 8;
United States v. 0.45 Acres of Land (CCA 2d, 1945), 151 F. (2d) 114.

And as said by this court in Catlin v. United States, 324 U. S. 229, the purpose of the Act "was to leave intact the owner's remedy existing before the statute was adopted."

While it has been held that where the actual taking of possession precedes the filing of the declaration of taking, the landowner is entitled to interest from the date of actual taking rather than from the date of the filing of the declaration of taking (United States v. 26.3765 Acres of Land [D. C. N. Y. 1945], 62 F. Supp. 910), that question is not presented in this case. Actual possession of the land had been taken on January 13, 1941 (R. 151). The Declaration of Taking was not filed and the estimated just compensation was not deposited until June 18, 1941 (R. 137, 143). While the landowner had sought interest from January 13, 1941, in the District Court, that court

ruled against this contention and started interest from June 18, 1941 (R. 185). Since the landowner did not appeal from this ruling he is bound by that portion of the findings and judgment. Consequently, the question here presented is the landowner's right to interest from the date of the filing of the Declaration of Taking to the date of the payment of the excess above the "estimated compensation" paid into the registry of the Court.

The United States deposited in the District Court, on June 18, 1941 the sum of $16,000 as the estimated just compensation (R. 143, 182). By this act, the United States repudiated the contract (R. 149) theretofore entered into between it and the landowner whereby the agreed purchase price or valuation of the land was fixed at $34,000. Although the landowner had proceeded to perform his obligations under the contract and the United States had taken possession of the land pursuant to the contract (R. 151), the United States did not take title to the land pursuant to the contract. This it could have easily done by either of two methods. If the United States was satisfied with the title delivered by the owner it could have accepted that title and compensated the landowner in the agreed amount. Or, if not satisfied with the title, the United States could have, as provided in the contract, commenced condemnation proceedings and deposited in the court the agreed amount of $34,000 and a consent verdict would have been entered in said amount (R. 151). The United States chose not to acquire land by either of these methods. Instead it repudiated (R. 301) the contract and commenced adversary condemnation proceedings. It acquired title to the land by virtue of the "Order and Judgment on Declaration of Taking" (R. 140), filed by the District Court on June 18, 1941. That order vested title to the land in fee simple absolute in the United States upon the filing of the Declaration of Taking and the depositing of the estimated compensa-

tion. The Order recited that the Petition and Declaration of Taking "state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition" (R. 140). The Court directed that "the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law" (R. 142).

Having acquired title, the next question was the ascertainment of the valuation of the land as of the time of the taking. While the landowner by his answer (R. 143, 152) brought this question to issue by alleging that the contract price of $34,000 determined the value of the land and the time of the taking from which he was entitled to interest, it was the United States itself that moved (R. 154) the District Court on April 6, 1945, to the effect that the United States "had executed an option contract for the purchase * * * from the defendants the said real estate for the sum of $34,000.00, being the amount of compensation fixed in said option contract," and that said option was "valid and binding." It is significant that the United States moved the Court "to enter judgment in this cause for the **condemnation** of the said real estate, **fixing the compensation** to be paid by plaintiff to the defendants **in the sum of $34,000**" (R. 155).

Here the cause was at all times a condemnation proceeding and the condemnation statute invoked (the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a) expressly provides for the payment of interest. **Can the United States invoke such a statute, acquire title to land for public use under such statute, move for the fixing of the compensation at a specified contract price of $34,000 and then avoid payment of interest on the $18,000 not de-**

posited for a period of almost four years, when the statute specifically requires the payment of interest? If the United States is able to frustrate the very purpose of the statute, it will destroy the guarantee of just compensation found in the Fifth Amendment to the Constitution. This it can do, if the technique adopted by the government in this condemnation is followed, by simply obtaining contracts and taking possession, then waiting any length of time it desires before commencing condemnation proceedings in which it would move for entry of judgment at the contract price. The Constitutional right to just compensation should not be so ludicrously defeated.

The Declaration of Taking Act fully recognized that the Government could not estimate the just compensation with infallible accuracy. Consequently, the Act provides (Section 1) that after just compensation is ascertained and awarded, the landowner shall be entitled as part of just compensation interest at the rate of 6 per centum per annum on the amount the final award exceeds estimated just compensation which was paid into the court. Such a provision as this was necessary to satisfy the requirements of just compensation guaranteed in the Fifth Amendment.

Thus in Lee v. United States (Ct. App. D. C. 1932), 58 F. (2d) 879, landowners challenged the constitutionality of an act (Act of May 25, 1926, as amended by Acts of January 13, 1928 and March 31, 1930, 44. Stat. 630, 45 Stat. 31, 46 Stat. 136, 40 U. S. C. A. Sec. 341 et seq.) which authorized the Secretary of Treasury to condemn certain lands in Washington, D. C. That Act's provisions are almost identical to those subsequently established in the Declaration of Taking Act in that it provides for the filing of a declaration of taking, the depositing of estimated just compensation, and the payment of 6% interest on the award or so much as is unpaid from

the date of the taking to the date of final payment. The landowners contended that these provisions were unconstitutional in that the taking was not accompanied or preceded by payment. The court rejected this contention and after summarizing the provisions, it said (l. c. 880):

> "• • • These provisions, when carried into effect, followed by the taking of the property, amount to a pledge of the public faith and credit, and the judgment rendered in such proceeding is as binding on the United States as a judgment in a proper case would be upon the humblest individual in the land. • • • The taking being duly authorized by Congress, there arises, upon the happening of that event, at once a pledge to pay, and the pledge becomes complete and definite when the ascertainment of just compensation has been duly had and a judgment entered therefor. In such a case it is unthinkable that Congress will not, with appropriate speed, procide the necessary money to discharge the judgment **and interest to the date of payment**, and this is all the Fifth Amendment requires in a case in which the sovereign is asserting the power of eminent domain. Crozier *v.* Krupp, 224 U. S. 290, 306, 32 S. Ct. 488, 56 L. Ed. 771."

In the instant case there was, as Congress anticipated there would occasionally be, an error, a substantial error, in the estimated just compensation. The Circuit Court of Appeals assigned this error to "the mistaken belief that the contract was void" (R. 302), but it was the United States that moved (R. 154) the District Court that the contract was "valid and binding." Obviously, the "agreed purchase price" or "agreed valuation," as the contract terms the $34,000, was the valuation as of the time the contract was entered into and the possession of the land acquired. "The just compensation constitutionally required is not the same thing as the sale price

of a capifal asset." Kieselbach v. Commissioner of Internal Revenue, 317 U. S. 399. Moreover, the Declaration of Taking Act provides for the payment of interest in just such a situation where an error has been made. The money deposited with the declaration of taking is not accepted in full of the demand. As said by the Circuit Court of Appeals for the Fifth Circuit in Atlantic Coast Line R. Co. v. United States, 132 F. (2d) 959: "The money thus deposited is not offered or accepted as in full of the demand, but is without prejudice and only to escape liability for accruing interest." In the instant case the District Court properly ordered at the time the title was vested in the United States that the just compensation "shall be ascertained and awarded in said proceeding • • • pursuant to law" and it is submitted that the District Court properly applied the law established under the Fifth Amendment and by the Declaration of Taking Act.

When the United States repudiated the option contract and commenced action pursuant to the Declaration of Taking Act by filing the declaration of taking, the condemnation was then "effected and title completely vested in the Government by the mere filing of a declaration of taking." The Government could not subsequently abandon the proceeding "so as to deprive the owner whose property has been taken of his constitutional right to have the damages assessed and paid in money." United States v. Sunset Cemetery Co. (CCA 7th 1943), 132 F. (2d) 163; Catlin v. United States, 324 U. S. 229. Nor could the landowner, after the Government invoked the exclusive jurisdiction of the District Court under the Declaration of Taking Act, bring a cause of action in the Court of Claims under the Tucker Act on any claims arising out of the condemnation. The Court of Claims would not have jurisdiction of such action. Dominion Smelting & Refining Corp. of N. J. v. United States, 102 Ct. Cl. 281. It is thus

seen that the only forum in which the landowner could stand on the valuation fixed by the contract was in the condemnation suit instituted by the United States; and the terms of the condemnation act invoked by the Government controlled the jurisdiction of the court and the proceedings. Danforth v. United States, 308 U. S. 271.

The controlling condemnation statute, the Declaration of Taking Act, requires the payment of interest. As we will next show, it makes no difference that the value of the land at the time of the taking was fixed by a valid and binding contract. The fact remains that only $16,000 was deposited (R. 143) as the estimated just compensation on June 18, 1941; that the judgment (R. 185) for the value of the land was $34,000; that the $18,000 difference was not paid into court until May 17, 1945 (R. 160). Since this is a condemnation proceeding instituted and prosecuted by the Government under the provisions of the Declaration of Taking Act, such facts require the payment of interest on $18,000 from June 18, 1941 to May 17, 1945 at the rate of 6 per cent. per annum.

III.

The Fact That the Value of the Property in a Condemnation Proceeding Is Fixed by a Valid Purchase Contract Between the Government and the Landowner Does Not Affect or Diminish the Right of the Landowner to Interest. Such Rights of the Landowner Are Determined by the Condemnation Statute Invoked by the Government.

There is only one conceivable factual difference between the instant case and numerous decisions cited under Points I and II holding that both the Fifth Amendment and the Declaration of Taking Act require the payment of interest where taking precedes payment. Here the price

or valuation of the land was fixed by contract at the time of the taking, instead of being fixed by commissioners or by a jury. While the Government repudiated the contract (R. 301) and instituted adversary condemnation proceedings, the fact is clear that it was the United States, on its own initiative before the District Court entered judgment, which moved the District Court to enter judgment in condemnation fixing the compensation of the landowner at the contract price of $34,000.00, because this Court, in Muschany v. United States, 324 U. S. 49, had held such contracts "valid and binding." It should also be noted that the United States voluntarily deposited the $18,000.00 in Court on May 17, 1945 (R. 160), even before the District Court ruled on its motion on July 2, 1945. The District Court did enter judgment (R. 180) directing the just compensation of the landowner to be $34,000.00 in accordance with the contract along with $4,230.00, being the amount of interest at the rate of 6% per annum as provided in the Declaration of Taking Act, on $18,000.00 from June 18, 1941, to the date of the order and judgment entered on the filing of the declaration of taking (R. 140), to May 17, 1945, the date the $18,000.00 was deposited in the registry of the court (R. 160).

There is no dispute that from June 18, 1941 to May 17, 1945 the landowner was deprived both of the use of the land and of a portion of its money equivalent. There is no dispute that the land was taken. The Circuit Court of Appeals held that no interest was allowable in the instant case because "the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled * * * by the terms of the purchase contract."

This holding is in direct conflict with the decision of this Court in Danforth v. United States, 308 U. S. 271. In the Danforth case the United States and Danforth, the

landowner, entered into a contract whereby the United States agreed to pay a designated amount for a perpetual flowage easement over the landowner's land. Later the United States came to the conclusion that the contract price was in excess of the actual value, so it repudiated the contract and commenced condemnation proceedings pursuant to the provisions of the Mississippi River Flood Control Act of May 15, 1928, 45 Stat. 534, 33 U. S. C. A., Sec. 702a et seq. The landowner in both his answer and in a counterclaim pleaded the contract and prayed judgment for the contract price along with interest. The Circuit Court of Apepals for the Eighth Circuit in that case (Danforth v. United States, 102 F. [2d] 5, rev'd 308 U. S. 271) held that the landowner's contention was founded upon an attempt to enforce a contractual obligation of the United States, which is the same holding that Court made in the instant case. From that holding the Circuit Court of Appeals in that case further concluded that the District Court did not have jurisdiction to consider the landowner's claim because the amount involved exceeded the jurisdictional amount of such claims which could be brought in the District Court by virtue of the provisions of the Tucker Act, Section 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20).

The Circuit Court of Appeals there gave two reasons for this conclusion, (1) that the United States was asserting a privilege inherent solely by virtue of sovereign power and not as a private suitor, and thus in no way waived immunity from suit, and (2) the landowner was clearly attempting to enforce a contract.

This Court, in Danforth v. United States, 308 U. S. 271, could not agree with that interpretation. It said, l. c. 282-283:

> "We construe the accepted offer as an agreement to fix the price at the named figure for the easement

sought. Paragraph 3 of the letter shows condemnation was in mind.

"This action is brought under the provisions of Sec. 4 of the Flood Control Act. The jurisdiction of the Court to consider the landowner's contention depends upon the language of that Act, not upon the Tucker Act or the general statute on condemnation. We have no doubt that the authority to purchase given the Secretary of War is sufficiently broad to authorize a purchase of petitioner's interest in land subject to perfecting the title through condemnation. The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title."

In the Danforth case the Government invoked the Flood Control Act, supra, and it was held that that Act determined the jurisdiction of the Court—that the cause was, therefore, not an action on contract. In the instant case, a different condemnation Act was invoked by the United States; but by the same reasoning, this is not an action on contract and was not so converted by the landowner in standing on the purchase contract as fixing the value. Instead, this proceeding is governed by the terms of the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a. That Act provides for the payment of interest on so much of the just compensation as is not deposited into Court from the date of taking to the date of payment. The Flood Control Act involved in the Danforth case has no such provision for taking possession, and possession was not taken prior to payment of the money. Consequently this Court in the Danforth case found there was no interest due, because possession had not been taken. This Court there pointed out: "Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view

that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor." It should definitely be observed that this Court there said, "The Congress in other situations has adopted the time of taking as the date for determination of value" and cited the Declaration of Taking Act as an example of this situation (l. c. 283-284).

Thus, it is clear, under the holding of this Court in the Danforth case, that the Declaration of Taking Act, being the Act invoked by the Government, controls the instant case as to the requirement of determining just compensation at the time of taking and the payment of interest on the amount withheld from the landowner from the time of taking to the date of payment. The Declaration of Taking Act specifically requires the payment of interest "on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment." Here the Government took actual possession on or about January 13, 1941 (R. 151). The deposit of $16,000, as estimated just compensation, was made on June 18, 1941 (R. 143, 182). But, it was not until May 17, 1945, that the Government deposited the remaining $18,000 in the registry of the District Court (R. 160, 182). There can be no question that upon the filing of the declaration of taking and the depositing of the estimated just compensation, the title was so irrevocably vested in the Government that the Government could not abandon the proceedings. The Circuit Court of Appeals for the Seventh Circuit said in United States v. Sunset Cemetery Co., 132 F. (2d) 163, 164:

> "Clearly under provisions of the statute, condemnation is effected and title completely vested in the Government by the mere filing of a declaration of taking and a judgment adjudging title in the United States is wholly unnecessary. Such is the statutory mandate. It follows that from and after the vesting

of title, the Government can be divested only by virtue of appropriate congressional authorization and not by an amended taking * * * Consequently the proceeding may not be subsequently abandoned so as to deprive the owner whose property has been taken of his constitutional right to have the damages assessed and paid in money."

Under the ruling of this Court in the Danforth case, the instant case clearly presents the following situation: The United States commenced these proceedings under the Declaration of Taking Act. Under that Act the value of the land could be fixed by a purchase contract and the landowner by standing on the price fixed by the purchase contract would not be maintaining a suit on a contract so as to oust the District Court of jurisdiction by virtue of the Tucker Act, supra. The Declaration of Taking Act, not the Tucker Act, controlled the jurisdiction of the District Court.

If this cause had been converted into a suit on contract the District Court would not have had jurisdiction under the terms of the Tucker Act because the amount involved is in excess of $10,000. This requirement as to amount is jurisdictional and one upon which the courts, on their own motion, must insist. Hammond-Knowlton v. United States, 121 F. (2d) 192, 202, cert. denied 314 U. S. 694. The Circuit Court of Appeals recognized that the Tucker Act was not applicable because, even though it held the action to be controlled by contract rather than the condemnation statute invoked, it nevertheless sustained the jurisdiction of the District Court by reversing, 155 F. (2d) 77, the instant case, 61 F. Supp. 199, and affirming, 155 F. (2d) 73, United States v. Oliver, 60 F. Supp. 741.

The observation of this Court in United States v. North American Transp. & Trading Co., 253 U. S. 330, should be noted. There, on the facts, interest was denied, but this Court said that interest could be collected "as a part of

just compensation in condemnation proceedings brought by the government. For such a proceeding * * * is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the Government institutes in order to secure title to land." The instant case is such an adversary condemnation proceeding brought by the Government pursuant to the Declaration of Taking Act in which the owner is the defendant. A necessary step in such a condemnation proceeding is the determination of the value of the land at the time of the taking and the determination of the just compensation due the landowner, including interest, where there has been a denial of the use of the land and its money equivalent. This is an integral part of the condemnation proceeding. Here the Government itself moved the District Court to fix the landowner's compensation at the value fixed in the contract. The interest required to render just compensation was operative by the statute invoked by the Government. The whole process of condemnation, including that of fixing just compensation, is one continuous integrated process of litigation. Hopkins v. McClure, 148 F. (2d) 67, 70.

Indeed, where the Government has instituted condemnation proceedings the District Court then has exclusive jurisdiction over all matters involved in the condemnation proceedings and the Court of Claims will not take jurisdiction of a suit in which the landowner seeks judgment on a claim allegedly arising out of the taking of the property involved in the condemnation proceedings, Dominion Smelting & Refining Corp. of N. J. v. United States, 102 Ct. Cl. 281. In that case the United States instituted condemnation proceedings pursuant to specified condemnation statutes and (after the condemnation proceedings were instituted, declaration of taking filed along with

estimated just compensation and the order vesting title in the United States was entered) the owners of leasehold interests filed suit in the Court of Claims for damages incident to the condemnation. The Court of Claims refused to take jurisdiction of the suit filed there on the ground that the District Court had exclusive jurisdiction; it said:

> "Under these acts the only court in which condemnation proceedings could have been brought was in the court in which they were brought, to-wit, the District Court for the District of New Jersey. That court has full jurisdiction to render a judgment for just compensation for the property taken, and to distribute the proceeds of that judgment among the various persons having an interest in that property in accordance with their respective interests. Plaintiffs in that suit can assert every right they have for just compensation for the taking of their interest in the property.
>
> "Just compensation includes not only the value of the various interests taken, but also every other element which goes to make up just compensation. • • •
>
> • • • • • • •
>
> "It is not our function, however, to determine in this suit what damages plaintiffs are entitled to recover. They can recover only because they are a part of the just compensation required by the Constitution to be paid for the taking of their property for public use. Transportation Co. v. Chicago, 99 U. S. 635; Gibson v. United States, 166 U. S. 269; Josten Co. v. Providence, supra; Mitchell v. United States, supra; Sharp v. United States, 191 U. S. 341; United States v. Grizzard, supra. By the Act of August 1, 1888, supra, jurisdiction to determine this question is vested exclusively in the District Court in which the condemnation proceedings are filed.
>
> "This court has jurisdiction to award judgment for just compensation for property taken and damages incident to the taking only where the property has been taken without the institution of condemnation

proceedings. Condemnation proceedings have been instituted in these cases. The court in which they were instituted has exclusive jurisdiction."

Once the Government repudiated the purchase contract, after it had taken possession of the land, and instituted the adversary condemnation proceedings, it could not abandon that proceeding. United States v. Sunset Cemetery Co. (C. C. A. 7th), 132 F. (2d) 163. The landowner could not bring, even if he had wanted to, action in the Court of Claims. Under the ruling of this Court in Danforth v. United States, supra, the landowner by standing on the price fixed in the contract in the condemnation proceedings did not convert the action into one on contract. The governing statute was the Declaration of Taking Act pursuant to which the Government instituted the proceedings and took title. The provisions of that Act require the payment of interest.

The Danforth case completely settles any question that could have existed as to the validity of contracts between the Government and landowners fixing the value of the land taken by condemnation. See also Muschany v. United States, 324 U. S. 49, where the same form of contract here involved was held to be valid and binding. In the Muschany case interest was included in the judgment of the District Court, as granted by the District Court in the instant case, and the question of interest was not raised by the Government on appeal in that case. The clear language of the Danforth case that the condemnation statute invoked controls the question of taking along with the plain mandate of the Declaration of Taking Act requiring payment of interest unquestionably establish the landowner's right to interest in the instant case.

IV.

Where the Purchase Price or Valuation of Land Is Fixed by Contract Between the Government and the Landowner and the Government Subsequently Prosecutes an Adversary Condemnation Proceeding Under the Declaration of Taking Act, But Fails to Deposit the Full Amount of the Agreed Price in the Court, the Landowner Is Entitled to Interest on That Portion of the Value Which Was Not Deposited, From the Date of the Taking Until the Time It Was Finally Paid.

Prior to the instant case there appears to have been only one other case directly ruling on the right of a landowner to interest where the United States took title to land under the Declaration of Taking Act but where the value of the land was fixed by contract. In that case, United States v. Baugh, 149 F. (2d) 190, the Circuit Court of Appeals for the Fifth Circuit held that the landowner was entitled to interest on that portion of the agreed value which was not paid into court and made available to the landowner.

In United States v. Baugh, supra, the United States commenced condemnation proceedings under the Second War Powers Act, 50 U. S. C. A., appendix, Sec. 632, on August 24, 1942. Several months thereafter the owners of numerous parcels within the area entered into stipulations with the United States wherein the parties agreed upon certain sums as just compensation for the taking of their property. The various stipulations provided and agreed that the court was "authorized and petitioned to enter * * * final judgment and decree in said action in accordance with the prayer in plaintiff's petition herein, or any declaration of taking which may hereafter be filed by the plaintiff, vesting the title to the above-described property in the United States of America, and adjudging **just compensation** for the lands taken to be the sum

of * * *." The Government had taken possession of each tract of land slightly more than a year before any compensation was made available, and there was a delay of seven months after entering into the contract until the money was paid into the Court. The District Court allowed interest from the date of the stipulations to the date the money was deposited in the Court. The United States' only specification of error was that the allowance of interest "on the sums agreed upon by the parties as just compensation violates the terms of the agreements and the rule that interest does not run on contractual claims against the sovereign." The Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the District Court said at l. c. 192-193:

> "In the present case the Government did not take a deed from the landowner as in an outright purchase, but it acquired title and possession by condemnation. **The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation** and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment. There is no mention in the stipulations that interest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right. In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights. Under the decisions cited above, the landowners had the constitutional right to receive not only just compensation but, where the taking precedes the payment, the landowner is also entitled to 'such addition as will produce the full equivalent of that value paid con-

temporaneously with the taking,' which additional value may be measured by the legal rate of interest, if reasonable, in the state where the property is located. * * *

* * * * * * *

"The landowners apparently were willing at the date of the agreements to accept the sums of money stipulated without past interest and expected the Government to make prompt payment of the amount agreed upon. But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. **Their right to have interest is found in the Constitution and is neither found nor lost in the contract.**

"The Constitution no more permits the deprivation of the money equivalent of land taken without just compensation than it does the deprivation of the use of land without just compensation."

It should be noted that the stipulation involved in the Baugh case specifically designated the agreed sum as "just compensation." It provided that the court be authorized to enter final judgment "adjudging **just compensation** for the lands taken, to be the sum of * * *." The contract in the instant case did not fix, or endeavor to fix, "just compensation." At all times, the contract here involved (R. 149-151) fixed only the **"purchase price"** or **"agreed valuation"** of the land. This contract provided that the Government would pay the "agreed purchase price" to the landowner upon the furnishing of a certificate of title. The contract further provided (R. 151):

"If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United

States in which said property is located, under a consent verdict fixing the award at the **agreed valuation** * * * and will upon filing its petition in such proceedings deposit said agreed **purchase price** * * *."

The attempted distinction of United States v. Baugh, supra, by the Circuit Court of Appeals below becomes meaningless, and is clearly **not warranted**, when the express language of the contract here involved, referring to the amount as the "agreed valuation" and "agreed purchase price" is read and compared with the language used in the stipulation and by the Court in United States v. Baugh, which refers to the amount there involved as "just compensation."

The conflict between the decisions of the two Circuit Courts of Appeal is further revealed by the totally diverse interpretation given by each of the Courts to the fact that neither the stipulation nor contract contained express provisions for the payment of interest. In the instant case the Circuit Court of Appeals stated (R. 302):

> "There is no provision in the contract for the payment of interest on the stipulated consideration, nor does the contract fix a time within which payment is required. * * * The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation, but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States. The purchase price stipulated in the contract may be fairly **regarded**, at the very least, as the agreed equivalent of just compensation for the taking of the land by condemnation or by purchase."

The interpretation given by the Fifth Circuit in United

States v. Baugh, on precisely the same question is diametrically opposed and in direct conflict with that of the Eighth Circuit in the instant case. This is clear from the following language in that case (149 F. [2d] 190, 192-193):

> "There is no mention in the stipulations that interest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking of possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right. • • • Their right to have interest is found in the Constitution and is neither found nor lost in the contract.
>
> "The Constitution no more permits the deprivation of the money equivalent of land taken without just compensation than it does the deprivation of the use of land without just compensation."

The Circuit Court of Appeals in the instant case was not willing to go so far as to say that the agreed purchase price, without interest, **actually** was just compensation. It said that such agreed purchase price "may be fairly regarded" (R. 302) as the equivalent of just compensation. In this way it indicates that it considers the landowner to have impliedly waived the constitutional right to interest as well as its right to interest under the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a. The Fifth Circuit, on the other hand (where the stipulation specifically designated the price as "just compensation" as contrasted with the contract here referring to it as the "agreed purchase price" or "agreed valuation"), stated that there was no reason to conclude that the landowner "**impliedly** waived any legal right" and that "their right to have interest is found in the constitution and is neither found nor lost in the contract."

The case of Holley v. United States (CCA 6th, 1942), 124

F. (2d) 909 (cert. denied 316 U. S. 685), while not ruling directly on the question of interest on an agreed valuation, throws some light on this question. There the City of Detroit and certain landowners contracted before condemnation was completed that the City would pay the awards in ten equal installments with interest on the unpaid balance. The opinion does not state whether the amount of the award was agreed upon or not. Pursuant to this contract the City made payments of the installments and interest. A landowner paid income tax on the interest payments, then filed a claim for a refund on the ground that the interest payments were exempt from taxation under the provision [Revenue Acts 1934, 1936, Sec. 22 (b), 26 U. S. C. A., Internal Revenue Code, Sec. 22 (b)] exempting interest on obligations of cities. The court rejected this contention and held that the interest was taxable as a portion of just compensation in a condemnation proceeding. It said:

> "While the contract to defer payment was voluntary, the taking was not, all the proceedings being under the power of eminent domain and necessarily compulsory upon the appellant. The compensation therefore had to be that required in condemnation proceedings, namely, the full equivalent of the value of the land at the time of the taking. Under such circumstances the interest is considered to be a part of the award itself, and essential to just compensation for the land where it is taken before full payment is made. Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664; Phelps v. United States, 272 U. S. 341, 47 S. Ct. 611, 71 L. Ed. 1083."

No doubt the failure of the Court below to reach the same conclusion that was reached in the Baugh case largely resulted from a misconception of the nature of "interest" required in such condemnation proceedings. (See discussion in Point I, supra.) The right to interest can not be

deprived a landowner because there is no specific demand to include interest, nor can the right to interest be taken away by statute or be qualified by the omission of a provision for interest. Jacobs v. United States, 290 U. S. 13. It is also submitted that the ruling of the Court below is erroneous as a result of confusion as to the precise nature of these adversary condemnation proceedings. (See discussion in Point V, infra, and Point II, supra.)

It is submitted that the reasoning of the Fifth Circuit in the Baugh case is sound and correct, whereas the decision and opinion of the Eighth Circuit in the instant case is not.

V.

The Payment of "Interest" in Condemnation Proceedings, Where the Taking of the Property Precedes Payment, Is Not the Awarding of Damages for Delay in Payment of an Obligation of the United States. Instead, Such "Interest" Is a Portion of Just Compensation Required by Both the Declaration of Taking Act and the Fifth Amendment.

Immediately prior to and during the period of this past war it was essential for the United States to acquire vast areas of land necessary for conducting numerous activities for the prosecution of the war. For one single project the War Department took over greater acreage than it took during the First World War. Marcus, Philip, "The Taking and Destruction of Property Under a Defense and War Program," 27 Cornell L. Q. 317, 326. The tremendous increase in condemnation is well indicated by the following table (see: Just, Carolyn, "Condemnation Procedure During World War II," 12 George Washington L. R. 286; see, also, Annual Reports of the Attorney General for the fiscal years ending June 30, 1939, 1940, 1941, 1942 and 1943):

"Fiscal Year Ending June 30

	1943	1942	1941	1940	1939
Number of new condemnation cases instituted	4,683	3,818	1,778	1,194	879
Number of tracts in cases filed...	43,970	36,920	12,333	6,372	6,069

"In 1942 these figures showed an increase in volume of 134 per cent over 1941, and 231 per cent over 1940. In 1943 there was an increase of 290 per cent over 1940. From the 1939 fiscal year to January 1, 1944, 13,973 separate condemnation actions were instituted for national defense, involving 118,664 tracts, and covering 22,202,564 acres, for which $357,965,922 was deposited into court as just compensation."

Most of the property acquired by the United States was secured through negotiation and contract. Marcus, "The Taking and Destruction of Property Under a Defense and War Program," 27 Cornell L. Q. 317, 344; "American Economic Mobilization," 55 Harv. L. Rev. 427, 509. Indeed, it is a basic policy of all acquiring agencies of the Government to exhaust the possibilities of voluntary purchase of property before resorting to condemnation. 1 Federal Eminent Domain 276.

The advantages of acquiring land by contract are obvious, especially where vast acreage must be speedily acquired. While the Declaration of Taking Act does provide a method whereby immediate possession and title can be obtained, there must still be under that Act a determination of value and considerable administrative detail. This can be eliminated by means of contract which provides, as the instant contract did, that a friendly condemnation suit will be prosecuted if necessary to clear the title. The obvious advantages of purchase by contract or option led the Government to adopt a definite program of acquisition by

contract. In 1940 the Lands Division of the Department of Justice published "Federal Eminent Domain." This publication clearly shows that the Government considered such option contracts to be binding as to the "value" of the land. It is significant that it is not said that the contract is binding as to "just compensation." Section 42 of this manual, entitled "Purchase Options and Agreements and Their Effect," sets out the various types of standard forms of option contracts developed by the Government. At page 218 it is said:

> "The agreement, when made in contemplation of subsequent condemnation proceedings, becomes the measure of **value**, and is binding both on the landowner and on the government. * * *
>
> "* * * it has been held that when the contract authorizes condemnation, **the price agreed upon** binds the owner even though it is not specifically provided that it shall have any effect in a condemnation proceeding."

Section 42-C of this manual, entitled "Procedure in enforcing option price in subsequent condemnation suit," instructs Government representatives what they should do in order to enforce such contracts, admonishing them that "the Government must insist upon its right to enforce the option." Sections 34-39 set out the administrative routine followed in securing options. **It is significant that this manual calls attention to the fact** (p. 110) **that where payment is made subsequent to the taking, interest must then be paid as a portion of just compensation.**

"Federal Eminent Domain" was published shortly before the acquisition of the option and contract by the Government in the instant case. It clearly establishes that the Government entered into such contracts as an exercise of its eminent domain powers, that such contracts were a step in the condemnation procedure, that both parties to such

contracts were bound as to the agreed value in subsequent condemnation proceedings, and that if there was a delay in payment the owner would be entitled to interest in addition to the value of the land. This administrative interpretation is to be accorded some weight. It shows that from the very outset the Government was acquiring this land by means of condemnation. The terms of the contract (R. 149-151) leave no doubt about it. But the Government repudiated the contract and never acquired title pursuant to it. Instead the Government acquired title by instituting and prosecuting an adversary condemnation proceeding under the Declaration of Taking Act. It was the Government (after the decision of this Court in Muschany v. United States, 324 U. S. 49) that moved (R. 154) the District Court to enter judgment in accordance with the contract. The judgment was entered on the Government's motion.

The Circuit Court of Appeals below completely failed to recognize the true nature of this proceeding. It held that no interest was allowable in the instant case, because "the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled * * * by the terms of the purchase contract." The Court said (R. 302):

> "By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract. * * *
>
> "The fact that the United States did not proceed with condemnation proceedings as contemplated by the purchase contract, but under the mistaken belief that the contract was void, cannot justify the award of interest not required by the contract. In the absence of a statute or an express contract providing for it,

> interest can not be added to an obligation of the United States. * * * The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest against the United States by way of damages for delay in payment of an obligation. '* * * interest does not run upon claims against the Government even though there has been a default in the payment of principal.' Smyth v. United States, 302 U. S. 329, 353."

This contention that the nature of a condemnation proceeding is converted into an action in contract so as to avoid the requirements of the Fifth Amendment and the condemnation statutes has been presented to this Court before and this Court has rejected the contention.

We have already pointed out (Point III) that in Danforth v. United States, 308 U. S. 271, this Court held, in an action commenced under a condemnation statute where the landowner stood on a contract fixing the price of the land, that the jurisdiction of the Court depends upon the language of the condemnation statute invoked by the condemnor and not upon the Tucker Act. While this Court held that by reason of the terms of the statute controlling that case there was no taking until the payment of the award and therefore no interest was due, this Court also cited the Declaration of Taking Act as an example of where Congress has by statute defined the doing of a specific thing as the determination of taking from which interest runs. The instant case presents precisely such a situation under the Declaration of Taking Act and under the terms of that Act on the facts here presented the landowner is entitled to interest.

Even in a situation where the Government does not institute condemnation proceedings and the landowner is forced to resort to the Tucker Act, this Court has held that interest is included in the right to just compensation. This was the situation in Jacobs v. United States, 290 U. S. 13,

where a Circuit Court of Appeals on authority of United States v. North American Transp. & Trading Co., 253 U. S. 330, held that the suit was on implied contract and interest was not allowable. This Court reversed and held that the North American Transp. & Trading Co. case was not applicable because it was not founded upon the Fifth Amendment, and that instead in suits founded on the Fifth Amendment the landowner "is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount to be added.'"

Nor, as stated by the Circuit Court of Appeals below, does there have to be a statute or an express contract provision for interest in order that interest be paid in a condemnation proceeding. As said by this Court in Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 304-305:

> "The owner's right does not depend on contract, express or implied. A promise to pay is not necessary."

In Jacobs v. United States, 290 U. S. 13, 16-17, this court said:

> "The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary * * *' **the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest** where such an allowance was appropriate in order to make the compensation adequate."

Moreover, since the condemnation statute invoked by the United States, which is the Declaration of Taking Act, controls the jurisdiction of the Court, Danforth v. United

States, supra, and since the Declaration of Taking Act specifically provides for interest, there is a clear statutory requirement of interest. This was entirely ignored by the Circuit Court of Appeals.

It should be observed that the reason assigned by the Circuit Court of Appeals as to why the adversary condemnation proceedings were "converted" into an action on contract is not an accurate statement of fact. The Circuit Court of Appeals stated (R. 302) that the landowners "by their successful defense of the validity of the purchase contract" converted the cause of action. The petitioner herein did nothing more than allege in the answers to the petition in condemnation and the motion by the Government that the contract was valid and that the value was fixed by it (R. 143, 156). This is nothing more than the landowner did in Danforth v. United States, supra. This issue was not tried by the Government. It was the Government, after this Court had definitely settled the validity of such a contract in Muschany v. United States, 324 U. S. 49, which voluntarily moved (R. 154) the District Court that such contract was valid and binding, and that the District Court fix the just compensation at the agreed value. There was thus no dispute as to the validity and binding nature of the contract. Certainly under these circumstances it could not correctly be stated that there was a "successful defense." But even if there had been a dispute which was litigated, the establishment of the price of the land at the time of the taking by the successful defense of an agreed valuation would still not constitute a conversion which would preclude the payment of interest. Danforth v. United States, supra.

Here, as in United States v. Baugh, 149 F. (2d) 190:

> "The stipulation merely had the effect of relieving the Government from having to make proof as to what

was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment."

Having taken the position that the proceeding was one on contract the Circuit Court of Appeals below stated:

> "The allowance of interest upon the consideration stipulated in the purchase contract would be **tantamount** to awarding interest against the United States by way of damages for delay in the payment of an obligation. '* * * interest does not run upon claims against the Government even though there has been a default in the payment of the principal.' Smyth v. United States, 302 U. S. 329, 353."

The Circuit Court of Appeals has unquestionably confused the nature of these condemnation proceedings and the nature of a suit on an obligation of the United States. Smyth v. United States, 302 U. S. 329, was not concerned with a factual situation at all comparable with the facts here presented. The Circuit Court of Appeals recognized that the facts here involved do not actually present a situation where interest would constitute damages for delay in the payment of an obligation because it uses the word "tantamount"—which means that it is not the same, but is "equivalent in value." Moreover, the Circuit Court of Appeals' reliance on the quoted sentence of Smyth v. United States, supra, leads it to ignore the repeated distinctions drawn by this Court between condemnation proceedings and other types of proceedings. Thus in United States v. North American Transp. & Trading Co., 253 U. S. 330 (cited and relied upon in Smyth v. United States, supra), a landowner brought a suit on an implied contract in the Court of Claims and sought interest. This

Court in holding that interest was not allowable on the facts in that case point out (l. c. 337), nevertheless, that **interest could be collected "as a part of just compensation in condemnation proceedings brought by the government. For such a proceeding * * * is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the government institutes in order to secure title to land."** The facts of the instant condemnation case certainly bring it within the situation where interest is constitutionally required and not within the situation where it is not allowable. This Court has repeatedly pointed out that United States v. North American Transp. & Trading Co., supra, was not a condemnation proceeding and that while interest was not allowed there, it is allowable in condemnation proceedings. Thus in Jacobs v. United States, supra, this court in holding interest allowable said, 290 U. S. 13, 18:

> "The case of United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. ed. 935, 40 S. Ct. 518, supra, cannot be regarded as establishing a different rule for the instant case. See Seaboard Air Line R. Co. v. United States, supra (261 U. S., p. 305, 676 L. ed. 669, 43 S. Ct. 354); Phelps v. United States, supra (274 U. S., pp. 343, 344, 71 L. ed. 1084, 1085, 47 S. Ct. 611). The North American Transp. & Trading Co. case rested upon its special facts. * * * The court said that the suit was not founded upon the Fifth Amendment. 253 U. S., pp. 334, 335. Suits brought to enforce the constitutional right to just compensation are governed by the later decisions which are directly in point."

In United States v. Rogers, 255 U. S. 163, 169, where the landowners, after order had been entered on the award, moved for a supplementary order requesting the payment of interest, this Court said:

"* * * In the present case the landowners did not sue upon a claim against the government, as was the fact in United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. ed. 935, Sup. Ct. Rep. 518. The government was seeking for purposes authorized by statute, to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran."

In Seaboard Air Line R. Co. v. United States, 261 U. S. 299, where the Government contended that interest was not allowable because there was not provision in respect to interest, this Court said:

"In support of its contention the government cites United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. ed. 935, 40 Sup. Ct. Rep. 518. That case does not sustain its contention. That was a suit in the court of claims, based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it, adopted by the conformity provisions."

And in Shoshone Tribe v. United States, 299 U. S. 476, this Court observed that given the taking, the right to interest "attaches itself automatically to the right to an award" and the North American Transp. & Trading Company case was distinguished as resting "upon its special facts."

As previously discussed (Point I) the use of the term "interest" undoubtedly contributed to the Circuit Court of Appeals' erroneous conclusion. It interpreted "inter-

est" literally, instead of considering it, as it is, a measure to ascertain the amount to be added as a portion of just compensation. Moreover, the use of the "implied contract" theory which has been utilized in some of the Tucker Act proceedings has allowed some confusion to creep in as to the proper basis of the right to just compensation. While the Tucker Act expressly permits suits against the United States based upon a constitutional right, there have been occasions when the recovery was based on the implied contract theory. See United States v. Lynah, 188 U. S. 445 (Note that White, Fuller and Harlan, JJ., dissented and that Mr. Justice Brown, with Shiras and Peckham, JJ., joining, wrote a concurring opinion which would rest jurisdiction solely on constitutional grounds). As observed by one commentator (Marcus, "The Taking and Destruction of Property Under a Defense and War Program," 27 Cornell L. Q. 317, 510), this implied contract theory has "led to strange results as to the right to interest." If the decision of the Circuit Court of Appeals had been made before the author wrote that observation, he would have unquestionably footnoted the observation with a citation to that decision. It must be observed that in such condemnation cases as Jacobs v. United States, Phelps v. United States and other cases discussed supra, this Court has rested the right of recovery directly on the Constitution. Those cases are controlling here.

Lower Federal Court cases also demonstrate that "interest in such a condemnation proceeding is not interest on an obligation of the United States." (See cases cited in Point I.)

The case of Holley v. United States (C. C. A. 6th, 1942), 124 F. (2d) 909, is pertinent. There the landowner and the City of Detroit had entered into a written agreement before condemnation was completed that the City would

pay the award in ten equal installments with interest on unpaid balance. The landowner contended that the interest payments were exempt from taxation because it was interest on the obligation of the city. The court rejected this contention because such "interest" was a portion of just compensation required by the Constitution in condemnation where the taking preceded payment.

In United States v. McIntosh, 2 F. Supp. 244, the Court of Claims had refused to allow interest. Because the landowner had failed to appeal from this ruling it was held that he was precluded from subsequently recovering interest, but the Court said (2 F. Supp. 244, 255):

> "Defendant's counsel also contends that the landowner in the McIntosh case is not estopped by acceptance of payment of the judgment of the Court of Claims, because the amount of the judgment did not constitute just compensation, in that, although it determined the value of the land as of the time of taking, it did not include compensation by way of interest or otherwise for the period between the time of taking and full payment. In refusing to include this element of just compensation, the Court of Claims acted on the theory that interest could not be allowed on claims against the Government without express statutory authority, which was not given by the Act of July 1, 1918, **thus apparently erroneously overlooking the consideration that in such cases the allowance of interest between the time of taking and full final payment is not the allowance of interest as such, but is simply one element of just compensation,** as has since been expressly decided by the Supreme Court in Phelps v. United States, 274 U. S. 341, 344, 47 S. Ct. 611, 71 L. Ed. 1083, and Seaboard Air Line R. Co. v. United States, 261 U. S. 304, 43 S. Ct. 354, 67 L. Ed. 664."

See also, Thayer-West Point Hotel Co. v. United States,

64 F. Supp. 565, where the action was definitely based on a contract, a lease. While neither the contract nor the statute mentioned interest, both required the payment of just compensation. The Court of Claims allowed interest saying at l. c. 568:

> "The suit here is on a contract and not for condemnation under the Fifth Amendment. Section 177 of the judicial code, 28 U. S. C. A., § 284, prohibits this Court from allowing interest 'unless upon a contract expressly stipulating for the payment of interest.' But the Supreme Court has held that interest, so-called, necessary to build compensation up to a point where it can be considered just as of the date of payment, is not interest within the meaning of Section 177 of the Judicial Code. Phelps v. United States, 274 U. S. 341, 344, 47 S. Ct. 611, 71 L. Ed. 1083.
>
> "Both statute and contract expressly provide for the payment of 'just compensation'. The compensation payable must be no less just than that payable under the Fifth Amendment. There is no plausible distinction."

Under the facts of this case and the foregoing body of law, it is submitted that the Circuit Court of Appeals erroneously conceived this adversary condemnation proceeding to be converted into an action on contract which would preclude the payment of "interest". Instead, "interest" as a measure of just compensation for the time the landowner was denied both the use of the land and its money equivalent is required by the Fifth Amendment and the Declaration of Taking Act.

CONCLUSION.

For the reasons stated, the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

ROSCOE ANDERSON,
705 Olive Street,
St. Louis 1, Missouri,
Attorney for Petitioner.

Of Counsel:

WILLIAM WAYE, JR.,
First National Bank Building,
St. Charles, Missouri,

W. R. GILBERT,
705 Olive Street,
St. Louis 1, Missouri.

APPENDIX A.

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be • • • deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

The pertinent portion of the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a, is as follows:

> "Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court."

The pertinent portion of the Tucker Act, 28 U. S. C. A., Sec. 41 (20), is as follows:

> "Sec. 41. The district courts shall have original jurisdiction:
>
> • • • • • • •

"(20) Suits against the United States concurrent with the court of claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in court of law, equity or admiralty, if the United States were suable. * * *"